IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 769 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHIMANBHAI KOANUBHAI TALPADA

Versus

STATE OF GUJARAT A

Appearance:

1. Criminal Appeal No. 769 of 1993

MS BANNA DATTA for Petitioner No. 1-3

MR IM PANDYA, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 11/03/2003

ORAL JUDGEMENT

1. The appellants have approached this Court by way of this appeal, challenging the judgment and order of conviction passed by the learned Additional Sessions

Judge, Nadiad in Special Case No. 43 of 1991 on 28th June 1993. By the said judgment, the appellants herein have been convicted for committing an offence under section 354 of the Indian Penal Code and section 3 (i) (ii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as the Atrocities Act] and have been sentenced to undergo rigorous imprisonment for three years and fine of Rs.1000/-, in default, rigorous imprisonment for three months. The appellants are also convicted for offences under sec. 323 read with sec. 114 of the IPC and sentenced to undergo simple imprisonment for one month and to pay fine of Rs.100/-, in default, simple imprisonment for seven days. The learned Judge has directed all the sentences to run concurrently.

2. The case of the prosecution, in nut shell, can be stated as under:

2.1 Prosecution witness No.4 - the complainant Ramilaben, on 19th August 1991, was returning with her brother from the flour mill at about 7 to 7.30 PM. When they reached near the school situated in Jawaharnagar locality, the present appellants came there and they assaulted Ramilaben and tried to drag her with a view to outrage her modesty. At that time, her brother tried to intervene and he was beaten up by the appellants with fist and kicks. On seeing the assault, Ramilaben raised shouts, as a result of which some persons came there and the appellant ran away from the scene. The complainant Ramilaben and her brother went to the police and lodged complaint with regard to the present incident, on 20th August 1991. The offence against the appellants was registered by the police of Nadiad Town Police Station, and thereafter the usual investigation commenced. In the course of the investigation, the present appellants were arrested. The Investigating Officer recorded the statement of Ramilaben, her brother and other persons acquainted with the facts of the case. On completion of the investigation, charge sheet was submitted for the offences under section 354 of the IPC and section 3 (i) (ii) of the Atrocities Act, etc. Since there was a charge under the Atrocities Act, the case was placed before the designated Court, viz. learned Additional Sessions Judge, and the case was numbered as Special Case No. 43 of 1991.

2.2 At the trial, the prosecution, in support of the case, examined Ramilaben, her brother Dalsing, Watchman of the school Galabhai Chhotabhai Vaghari and the

Investigating Officer Chanchalben Navinchandra Mackwan. Over and above this, the prosecution also placed reliance on the evidence of the panch witnesses.

2.3 After recording of the oral evidence was over, the trial Judge put all the incriminating circumstances appearing against the accused in evidence to them, while recording the statements under section 313 of the Cr. P.C. Their defence appears to be that of general denial. However, at one stage, they have stated that because they were falsely involved in criminal cases such as prohibition cases etc. they had a quarrel with the police, and since then the police is after them. The learned trial Judge, at the end of the trial, found the appellants guilty of committing the aforesaid offences, and passed order of sentence as stated above. In these circumstances, the appellants have approached this Court.

3. Ms. Banna Datta, learned advocate appearing for the appellants has submitted that the conviction and order of sentence passed by the learned trial Judge are totally dehorse the evidence on record, and the learned Judge ought to have acquitted the appellants. She has further submitted that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt, and therefore also, they ought to have been acquitted by the learned trial Judge. Lastly she has submitted that this appeal deserves to be allowed.

As against this, Mr. I.M. Pandya, learned APP has submitted that no flaw can be found in the judgment of the learned trial Judge, and the trial Court is completely justified in imposing the aforesaid sentence. He has also submitted that the prosecution has adequately proved the guilt of the appellants, and there is no need for this Court to disturb the judgment and order of conviction passed by the trial Court. Lastly he has submitted that this appeal deserves to be dismissed.

4. With a view to re-appreciate the entire evidence on record, I have carefully gone through the record of the case, and have also given my thoughtful consideration to the submissions advanced by both the sides.

5. The record of the case shows that Ramilaben has been examined as PW.4. She, at the relevant time, was aged 19 years and was doing labour work. She has stated in her evidence that she was staying with her family comprising five members. She has also stated that about two years prior to the date of recording her evidence, she was staying at Nadiad, and was doing labour work. On the date of the incident, while she was passing near the

school at Jawaharnagar along with her brother, the appellants came there and tried to play mischief with her by touching their hand to her breast and other parts of her body. She has further stated that the intention of the appellants was to take her to a place near the lavatory with a view to have sexual intercourse. At that time, her brother tried to save her, but he was beaten, and thereafter she raised shouts, as a result of which some persons came there and the appellants ran away. She has also stated that her surname is Baraia, and she is a member of Bhil community, which is considered to be a scheduled tribe.

5.1 In the cross examination, she has stated that at the time when the incident took place there was complete darkness. She has also stated that she was at that time walking along the railway track where there was no light. She has stated that because of darkness, she was not able to identify the assailants properly. She has also stated that at the time when the incident took place, she was not knowing the names of the appellants. Further, she has stated that after the incident she was seeing the appellants for the first time in the court room. She has further stated that immediately after the incident, the assailants had run away, and thereafter she had not seen them. It is also in her cross examination that her brother, at that time, was merely standing, and he did not do anything to save her.

6. The prosecution has also placed reliance on the evidence of Dalsingh Kalubhai Machhar, PW.5, Ex.14. In the examination-in-chief he has stated that on 19th August 1991, they had gone to the flour mill, and while returning, at about 7.30 PM., the appellants came there and they started dragging his sister away from him. He has further stated that the appellants had a fight with him as well as his sister and they were trying to drag her with a view to have sexual intercourse with her. He has further stated that when they reached their house, some people came there but their names were not known to him.

6.1 In the cross examination, this witness has admitted that at the time of incident, it was very dark and it was very difficult to identify anyone. He has further stated that when they were proceedings towards the school, the appellants came there, and on seeing three persons coming to them, they raised shouts and those three persons ran away. He has also admitted that he was seeing the appellants for the first time after the incident in the court room. He has further stated that the police had recorded his statement two days after the

incident.

7. Apart from this, the prosecution had also examined Galabhai Chhotabhai Vaghri, PW. 1, Exh.8, who at the relevant time was working as a Watchman in the Municipal School near Pragatinagar. As per the prosecution, on hearing the shouts of Ramilaben and Dalsingh, this witness had immediately rushed to the spot. However, this witness has not supported the prosecution case, and he has been declared as hostile.
7.1 In the cross examination by the learned Public Prosecutor, he has stated that whatever that was recorded by the police in his statement was not stated by him. Subsequently, he has voluntarily stated that his statements were recorded by the police by exercising force.

8. Similarly, two other witnesses, viz. Hasanbhai Alibhai Momin, PW.2 Exh. 9 and Rakeshkumar Julius Merchant, PW.3, Exh. 11, who were called as Panchas for drawing the panchnama of the scene of offence, have turned hostile and not supported the prosecution. Lastly, the prosecution has examined Chanchalben Navinchandra Meckwan, Police Sub-Inspector who investigated the case as prosecution witness, which is at Exh. 15. From her evidence, it appears that at the place where the incident took place, no light is available. A suggestion has been put to her by the defence that because of the appellants' involvement in various cases under the Prohibition Act and Prevention of Gambling Act, there was an altercation between the appellants and the police, and the appellants have been falsely involved in this case. This suggestion has, however been denied by this witness.

9. Considering the aforesaid evidence and the contents of the complaint as well as the panchnama, it clearly appears that the incident took place at about 7.30 PM. near the Railway track where there is no provision of light. It also appears that the appellants were not previously known either to Ramila or Dalsingh. It is also very clear from the evidence of Ramila that she was not able to properly identify her assailants because of the darkness. Even her brother Dalsingh in his evidence says that it was not possible to identify anyone because there was complete darkness at the place. Both these witnesses have further stated that at the time of the incident, they were not knowing the names of the appellants. They have also stated that immediately when shouts were raised and people arrived there, the appellants had run away, and thereafter they had never

seen them again. It was for the first time after the incident that they were seeing the appellants in the court-room at the time of recording of their evidence in the trial. It may be noted here that as per the record of the case, the date on which the incident took place is 19th August 1991 whereas the evidence of Ramila was recorded on 11th June 1993. The evidence of Dalsingh was also recorded on 11th June 1993. Therefore, almost one year and ten months had elapsed between the date of the incident and the date of recording of the evidence. If this aspect is considered coupled with the fact that both these witnesses were not in a position to identify the assailants because of the darkness at the time of the incident, it would be rather impossible for them to identify them in the court-room, and to say with certainty that it was the appellants and none else who were the assailants. The evidence of both these witnesses so far as identifying the accused is concerned, is very unsatisfactory and the appellants cannot be held guilty on the strength of such evidence. Further, if the evidence of Dalsing is considered carefully, though in the examination-in-chief he speaks about his sister being dragged by the appellants, in the cross-examination he states that on seeing three persons coming to them in darkness, they raised shouts and therefore the three persons ran away. If that be so, it is very difficult to understand at what point of time the appellants got hold of Ramila and dragged her. If the subsequent part of his evidence is to be believed, it clearly appears that before anything could happen, the appellants had run away from the place. Apart from this, the conduct of this witness is also unnatural inasmuch as when his sister was being assaulted by three persons, he simply stood there as a silent spectator, and did not make any attempt to save her. All these factors create doubt about the prosecution story. It may also be remembered here that though the incident took place on 19th August 1991, the complaint has been given on the next date, i.e. 20th August 1991, and the statement of Dalsing was recorded two days after the incident, as per his own say. The prosecution has not explained these aspects satisfactorily.

10. Considering all these circumstances, it can safely be said that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt. The conclusion reached by the trial Court, therefore, appears to be erroneous. If that be so, the judgment and order of conviction and sentence recorded by the trial Court based on such evidence are required to be quashed and set aside, and they are hereby quashed and

set aside.

11. In the result, the appeal is allowed. The appellants are on bail. Their bail bonds stand cancelled.

Sd/-
(AKSHAY H.MEHTA, J.)
mathew